

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL REVISIONAL JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRR 1296 of 1999

PRADIP KUMAR ROY @ HARU ROY
VS.
STATE OF WEST BENGAL

For the Petitioner : Mr. Abhijit Basu, Adv.
Mr. Arghya Kamal Das, Adv.,

For the Opposite Party : Mr. P.P. Das, Adv.,
Ms. Manisha Sharma, Adv.

Hearing concluded on : 20th September, 2022

Judgement on : 22nd September, 2022

Siddhartha Roy Chowdhury, J:-

1. This proceeding stems out of an application under Section 482 of the Code of Criminal Procedure filed by the Pradip Kumar Roy @ Haru who has been saddled with an order of conviction for allegedly committing offence of rape upon the victim girl (in view of Section 228 A of the I.P.C. I am not inclined to disclose the name of the girl allegedly deflowered; hereinafter she will be referred as to 'victim girl'). Smt. Fulmala Mondal depicting herself as mother of the victim girl set the criminal administration of justice into motion by submitting a petition of complaint before the learned S.D.J.M., Ranaghat, District-Nadia which was forwarded to Officer-in-charge, Dhantala P.S. under

Section 156 (3) of Cr.P.C. Accordingly, Dhantala P.S. Case No. 50/1995 dated 5th May, 1995 was registered. Police took up investigation which culminated into submission of charge sheet against the accused person. After compliance of the provision of Section 207 and 209 of the Cr.P.C. the case was transferred to learned Assistant Sessions Judge, 2nd Court, Krishnanagar, Nadia for disposal.

2. Learned Trial Court framed charge under Section 376 of the I.P.C. to which the accused/petitioner pleaded his innocence and claimed to be tried.
3. Prosecution examined as many as 11 witnesses and Doctor Tarun Kanti Ghosh was examined as Court Witness No. 1. Learned Trial Court having considered the evidence adduced by prosecution witnesses recorded an order of conviction against the accused and he was sentenced to suffer rigorous imprisonment for 5 years and to pay fine of Rs. 1000/- with a default clause.
4. The convict made an unsuccessful attempt to get the order of conviction reversed in an appeal being Criminal Appeal No. 19 of 1998 before the learned Additional Sessions Judge, 2nd Court, Krishnanagar, Nadia. Learned Appellate Court, however, modified the order of sentence by reducing the term of imprisonment from 5 years to 2 1/2 years and fine of Rs. 1000/-.
5. The petitioner has called in question the legality of the said judgement of learned Appellate Court by filing this application under Section 482 of the Cr.P.C.
6. Assailing the impugned judgement learned Counsel for the petitioner Mr. Abhijit Basu submits that the victim girl at the relevant

point of time attained the age of consent. She was found to be of 17 years by the doctor during ossification test.

7. Section 375 of the I.P.C. before amendment used to define rape in the following manner:-

“375. Rape. – A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First. – xxxxxx

Secondly. – xxxxxx

Thirdly. – xxxxxx

Fourthly. – xxxxxx

Fifthly. – xxxxxx

Sixthly. – With or without her consent, when she is under sixteen years of age.

Explanation. – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception. – Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

8. Drawing my attention, the impugned judgement passed by the learned Appellate Court, learned Counsel for the petitioner submits that learned Appellate Court also observed that the age of the victim at the relevant point of time was more than 16 years but without setting aside the order of conviction, reduced the sentence. But for all practical purposes, when the victim girl was above the age of 16 years it should have been considered that she was consenting partner in the union of two and thereby the alleged incident should not have been brought within the mischief of Section 375 of the I.P.C.

9. Drawing my attention to the petition of complaint submitted by the mother of the victim girl, learned Counsel for the petitioner submits that the victim girl and the accused who turned out to be the convict had intimate relationship and she preferred to turn deaf ear to the advice of her mother and indulged in sexual intercourse with the convict.
10. My attention is drawn to the testimony of the victim girl who adduced evidence as PW-3. According to PW-3, she was ravished for the first time in the first part of the month of Falgun when the convict allegedly came to her house in absence of her mother and asked for a glass of water. The victim girl when went to fetch a glass of water suddenly the petitioner caught hold of her, gagged her and dragged her nearly 70-80 feet away from her residence and committed the mischief. The victim girl did not disclose the incident to anyone including her mother. After 4-5 days again in absence of her mother the alleged perpetrator came in the evening and forcefully took her away to their garden and committed rape after overpowering the victim girl. Within few minutes of alleged incident one Thakurdasi Bala came in search of the victim girl. When the petitioner fled away Thakurdasi Bala found the victim girl was crying and she narrated the incident to Thakurdasi.
11. According to the learned Counsel for the petitioner though the victim girl in her oral testimony claimed to have tried her best to resist the perpetrator but the evidence adduced by the victim girl if considered, from the point of view of human probability speaks otherwise.

12. Learned Counsel representing the State submits that the testimony of victim girl together with the testimony of attending doctor unerringly suggest that the victim girl was subjected to sexual assault within the meaning of Section 375 of the I.P.C. The order of conviction, according to learned Counsel for the State may not be disturbed and impugned judgement passed by learned Appellate Court may be allowed to remain in force.
13. It has become settled principle of law that in a case of sexual assault Court should not seek corroboration unless it is absolutely necessary; keeping that principle in mind, I am inclined to consider the oral testimony of victim girl before taking the call to invoke the inherent jurisdiction conferred under Section 482 of the Cr.P.C.
14. The written information given by the mother of the victim indicates that the victim had acquaintance with the petitioner and she preferred to ignore the advice of her mother. No document since was not produced to demonstrate the date of birth of the victim girl, we have to depend upon the report of the ossification test. From the testimony of PW-11 I find that the victim girl was found to be of 17 years at the time of incident. Exact age cannot be determined by way of radiological examination, which leaves a margin of two years on either side of age range prescribed by the test. Benefit of two years margin of error principle always goes in favour of the accused person. Therefore, there is every reason to presume that the victim girl attained the age of consent or in other words she cannot be considered in the light of the description Sixthly given in Section 375 of the I.P.C. Sixthly – With or without her consent when she is under sixteen years of age.

15. The victim girl and the alleged perpetrator admittedly were known to each other being neighbours. According to PW-3 first time she was overpowered by the perpetrator who gagged and dragged her for about 70-80 feet, the victim girl did not raise any alarm. She preferred to maintain silence. Her mother was kept in dark. The same incident happened after 4-5 days when the victim girl was dragged to their garden by alleged perpetrator. This time she wept having found Thakurdasi calling the victim girl by name. On both the occasions, the convict/petitioner appeared in the house of the victim girl when her mother was absent. On the first day he was successful in dragging the victim girl for about 70-80 feet single handedly, spread a shawl or wrapper on the grass then ravished her and instead of making any attempt to flee she was watching the accused. This testimony of PW-3 together with her silence after being ravished by the convict is eloquent about her consent and her conduct becomes relevant under Section 8 of the Evidence Act. Police was informed only after the proposal of marriage was turned down. Learned Appellate Court observed:- “So it is crystal clear that Sujata had got tacit consent for doing some illegal work like sexual intercourse with appellant victim Pradip @ Haru and Sujata might have the consenting party and both of them were known to each other for a considerable time and both of them were fall in love or some illicit connection that was with the knowledge of Fulmala”. Having indicated the tacit consent learned Appellate Court should have extended benefit of doubt to the convict instead of giving concession by reducing the sentence from 5 to 2½ years of imprisonment.

16. Under such circumstances, I am of the view that this is a fit case to invoke the provision of Section 482 of the Cr.P.C. to quash the judgment of affirmance passed by learned Appellate Court in Criminal Appeal No. 19 of 1998 to prevent miscarriage of justice which I accordingly do.
17. The judgement and order of conviction passed by learned Appellate Court is thus quashed.
18. Let a copy of the judgement be sent down to learned Trial Court for information and taking necessary action.
19. Urgent Photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)